

## THE HIGH COURT OF SINDH, KARACHI

**Present:**

Mr. Justice Zulfiqar Ahmad Khan

Mr. Justice Adnan Iqbal Chaudhry.

**Spl. Cus. Ref. A. No. 05 of 2016**

[Collector of Customs versus Shahzad]

Applicant : Collector of Customs through  
Mr. Iqbal M. Khurram, Advocate.

Respondent 1 : Shahzad son of Abbas through  
Ms. Dil Khurram Shaheen, Advocate.

Respondent 2 : Nemo.

Date of hearing : 23-02-2022

Date of decision : 23-02-2022

### **JUDGMENT**

**Adnan Iqbal Chaudhry J.** - By short order dated 23-02-2022 we had answered the Reference under section 196 of the Customs Act, 1969 in favour of the Applicant. Following are reasons for the same.

2. Pursuant to order dated 15.01.2016, the following question of law was proposed for our consideration under section 196 of the Customs Act, 1969:

“Whether the learned Appellate Tribunal, Bench-I, Karachi has misinterpreted the meaning and interpretation of clause (s) of Section 2 and 157 of the Customs Act 1969, while releasing the vehicle in question, thereby defeating the clear intent to law ?

3. The facts are that on 24.03.2015, an LPG bowser, bearing registration No. TTC-221, parked at a road-side eatery some distance from Jamshoro toll plaza, was searched by the Customs Anti-Smuggling Organization on the suspicion that it was transporting foreign-origin smuggled high speed diesel (HSD). Apparently, the driver of the vehicle abandoned it on seeing the customs personnel. A physical examination of the bowser revealed that it was altered to

create a small hole in its roof for filling and unloading, contrary to the design and purpose of a bowser/tanker meant for carrying LPG. The bowser was found containing 18,000 liters of foreign-origin HSD, hence both the HSD and the vehicle were seized. The registration book of the vehicle recovered from the vehicle bore name of the Respondent as owner. Notice of seizure under section 171 of the Customs Act was issued to the Respondent, followed by a show-cause notice dated 21.04.2014 under section 180 as to why the HSD and the vehicle should not be confiscated and penalty imposed for offences of smuggling under clauses (8) and (89) of section 156(1), read with sections 2(s) and 157 of the Customs Act, 1969 and section 3(1) of the Imports & Exports (Control) Act, 1950.

4. It appears that the Respondent did not file a written response to the show-cause notice; however, his counsel appeared at the hearing and took the stance that the Respondent had contracted the vehicle for hire to one Mr. Qadir for transporting LPG and was unaware that the latter was using it for transporting smuggled HSD. He therefore prayed only for the release of the vehicle.

5. Since no one turned up to lay claim to the seized HSD and to dispute that it was smuggled, the Deputy Collector (Adjudication) passed Order-in-Original dated 20.05.2015 for outright confiscation of both the HSD and the vehicle. The Respondent, being aggrieved to the extent of confiscation of the vehicle, appealed before the Collector of Customs (Appeals). That was dismissed by order dated 29.06.2015 after observing that the Respondent could not justify his stance and had not come with clean hands. However, the Respondent succeeded in appeal before the Customs Appellate Tribunal, which held by order dated 21.10.2015 (impugned order) that the investigating officer had failed to establish any nexus between the Respondent/owner of the vehicle and the smuggled HSD, and thus set-aside the order of confiscation of the vehicle.

6. Learned counsel for the Applicant submitted that in setting aside the confiscation order of the vehicle, the learned Tribunal did not appreciate the provisions of sections 2(s) and 157(2) of the Customs Act, 1969. On the other hand, learned counsel for the Respondent supported the order of the learned Tribunal and in that regard she relied on the case of *Abdul Razzak v. Pakistan* (PLD 1974 SCMR 5).

7. Learned counsel were heard and the record was examined with their assistance.

8. As narrated above, none turned up before the *fora* below to dispute that the HSD seized was of foreign-origin, that it was smuggled into the country, and that it was liable to outright confiscation. That the vehicle in question was only masquerading as a LPG bowser and it had in fact been contrived to conceal a small hole in its roof for filling and unloading smuggled HSD, was also a fact that remained unchallenged. The Respondent had turned up only to claim ownership of the vehicle and its release on the ground that he had given the vehicle on hire to another person and did not have knowledge that it was being used to transport smuggled HSD. Therefore, the only question before the Tribunal was whether in such circumstances the vehicle too merited confiscation.

9. The provisions of the Customs Act, 1969 that are relevant to the issue are as follows:

**“157. Extent of confiscation.--** (1) Confiscation of any goods under this Act includes any package in which they are found, and all other contents thereof.

(2) Every conveyance of whatever kind used in the removal of any goods liable to confiscation under this Act shall also be liable to confiscation.

Provided that, where a conveyance liable to confiscation has been seized by an officer of customs, the appropriate officer may, in such circumstances as may be prescribed by rules, order its release, pending the adjudication of the case involving its confiscation if the owner of the conveyance furnishes him with a sufficient guarantee from a scheduled bank for the due production of the conveyance at

any time and place it is required by the appropriate officer to be produced.

(3) Confiscation of any vessel under this Act includes her tackle, apparel and furniture.

**181. Option to pay fine in lieu of confiscated goods.--** Whenever an order for the confiscation of goods is passed under this Act, the officer passing the order may give the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as the officer thinks fit.

*Explanation.--* Any fine in lieu of confiscation of goods imposed under this section shall be in addition to any duty and charges payable in respect of such goods, and of any penalty that might have been imposed in addition to the confiscation of goods:

Provided that the Board may, by an order, specify the goods or class of goods where such option shall not be given:

Provided further that the Board may, by an order, fix the amount of fine which, in lieu of confiscation, shall be imposed on any goods or class of goods imported in violation of the provisions of section 15 or of a notification issued under section 16, or any other law for the time being in force.

**Notification No. S.R.O. 499(I)/2009**, dated 13<sup>th</sup> June, 2009.-- In exercise of the powers conferred by section 181 of the Customs Act, 1969 (IV of 1969), and in supersession of its Notification No. S.R.O. 487(I)/2007, dated 9<sup>th</sup> June, 2007, the Federal Board of Revenue is pleased to direct that no option shall be given to pay fine in lieu of confiscation in respect of the following goods or classes of goods, namely:--

- (a) smuggled goods falling under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969);
- (b) lawfully registered conveyance including packages and containers found carrying smuggled goods in false cavities or being used exclusively or wholly for transportation of offending goods under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969); or

.....  
.....”

10. Thus, section 157(2) of the Customs Act stipulates that a conveyance used in the removal of any goods liable to confiscation under the Act, such as smuggled goods, shall also be liable to confiscation. Section 181 of the Act then envisages an option to the owner of the conveyance to pay fine in lieu of confiscation. But, by way of SRO 499(I)/2009 issued under the first proviso to section 181 of the Customs Act, that option is not available where the conveyance is found carrying smuggled goods in false cavities or being used

exclusively or wholly for transportation of smuggled goods. The vehicle in question was one such a conveyance which was being used exclusively and wholly for transportation of smuggled goods; and thus the benefit of section 181 of the Customs Act was not available to the Respondent. That much is settled, and in that regard reliance can be placed on the cases of *Panjgoor Goods Transport Co. versus Federation of Pakistan* (2020 PTD 59), and *Director, Directorate General, Intelligence & Investigation (Customs) v. Aurangzaib* (2021 PTD 1026). The question that then arises is whether section 157(2) of the Customs Act is a *fait accompli* for the owner of the conveyance ?

11. Learned counsel for the Respondent relied on the case of *Abdul Razzak v. Pakistan* (PLD 1974 SCMR 5) to submit that where the investigating officer could not prove that the owner of the conveyance too was involved in transporting the smuggled goods, his conveyance could not be confiscated. In *Abdul Razzak*, the Supreme Court interpreted section 168 of the Sea Customs Act, 1878, a provision similar to section 157 of the Customs Act, 1969, and held that the words 'liable to confiscation' in relation to a conveyance carrying the smuggled goods, do not mean automatic confiscation alongwith the smuggled goods; rather such provision vests a certain discretion in the confiscating authority, which discretion has to be exercised upon the principles of natural justice, i.e. to give the owner of the conveyance an opportunity to explain his position; and that no person could be deprived of his property by way of penalty unless he is in some measure responsible for assisting or furthering the commission of the offence. After discussing that law, the Hon'ble Supreme Court ordered release of the vehicle to its owner but only after noting that there was an FIR by the owner that the vehicle had been stolen from him; that the investigation report of the FIR had supported the owner's version; and that there was a finding by the Government itself that the owner of the vehicle was not involved in the offence. In other words, the vehicle was ordered to be released when the owner was able to satisfy the Court that he was not

involved in the offence. Therefore, the case of *Abdul Razzak* is not for the proposition that the conveyance carrying the smuggled goods cannot be confiscated until the offence is proved against the owner of the conveyance, but that, since such was a discretionary power, it should be exercised keeping view the circumstances of the case and the explanation offered by the owner of the conveyance.

12. Similar to section 168 of the Sea Customs Act, 1878, the words 'liable to confiscation' in section 157(2) of the Customs Act, 1969 also do not mean to say that the conveyance 'shall be confiscated automatically' without advert to the circumstances of the case. That much is also manifest in section 181 of the Customs Act when it envisages a release of the conveyance on payment of fine in lieu of confiscation *albeit* with certain exceptions. At the same time, it cannot be said that the conveyance carrying the smuggled goods can never be confiscated under section 157(2) of the Customs Act until the offence is proved also against the owner of the conveyance, for that would then make section 157(2) redundant. The primary purpose of section 157(2) is to deal with the clandestine involvement of the owner of the conveyance in transporting the smuggled goods, and one who subsequently surfaces to contest confiscation of the conveyance on the pretext that he was unaware of the criminal intent of the user of the conveyance, a plea difficult to disprove especially when the user of the vehicle is absconding. It is for this reason that in terms of clause 89(i) of section 156(1) of the Customs Act, the burden of proof is cast on such owner to show that he was not complicit in the offence.

13. The learned Tribunal did not advert to any of the provisions of law discussed above; rather set-aside the confiscation of the vehicle on the misconception that it was for the investigating officer to first prove that the Respondent/owner of the vehicle was complicit in the offence. Though a document was casually produced by the Respondent before the Tribunal, apparently for the first time, as the contract of hire where under he had delivered possession of the

vehicle to one Abdul Qadir, that document was completely unsubstantiated. There was no disclosure by the Respondent as to who Abdul Qadir was; the Respondent did not show any payment received by him from said Abdul Qadir under the alleged contract; there was no intimation under Rule 51 of the Motor Vehicle Rules, 1969 to the Motor Vehicles Registering Authority that possession of the vehicle had been delivered to said Abdul Qadir under a contract of hire; and no attempt was made by the Respondent to explain that he remained unaware of the hole made in the roof of his LPG bowser for purposes of transporting smuggled goods, and which had practically made such bowser unfit for carrying LPG.

14. In view of the foregoing, where the body of the LPG bowser was found altered to conceal and carry smuggled goods, and where the Respondent as owner of that vehicle hardly gave any explanation to meet the burden of proof on him, the provision of section 157(2) of the Customs Act, 1969 was fully attracted for confiscating said vehicle; hence the question of law reproduced first above, was answered by us in the affirmative by the short order dated 23-02-2022. Resultantly, the order dated 21-10-2015 passed by the Customs Appellate Tribunal in Customs Appeal No. H-949/2015 is set-aside, and the Order-in-Appeal No. 10238/2015 dated 29-06-2015 is reinstated.

A copy of this judgment under seal of the Court be sent to the Customs Appellate Tribunal as per section 196(5) of the Customs Act, 1969.

**JUDGE**

**JUDGE**

Karachi  
Dated: 18-03-2022